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COURT OF CRIMINAL APPEALS
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COURT OF CRIMINAL APPEALS
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## IN THE COURT OF CRIMINAL APPEALS

## OF THE STATE OF TEXAS

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**ENRIQUE ANGEL RAMOS,**
**Appellant**
**v.**
**THE STATE OF TEXAS,**
**Appellee**

**Appeal from Thirteenth Court of Appeals**
**Cause No. 13-17-00429-CR**
**Trial Court Cause No. CR-0183-16-E**
**Hidalgo County, Texas**

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# APPELLANT'S MOTION FOR REHEARING

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MAY IT PLEASE THE COURT:

COMES NOW Appellant Enrique Angel Ramos, by and through his appointed appellate attorney, Victoria Guerra, and files this motion for rehearing and would show this Court the following:

**History:** Appellant was convicted both of continuous sexual abuse of a child, Count 1, under Section 2 l .02(b) of the Texas Penal Code, and of prohibited sexual conduct, Count 2, under Section 25.02(a)(2). As to the Count 1'a continuous sexual abuse of a child, the indictment alleged:

> during a period that was 30 days or more days in duration, to-wit: from on or about 11th day of August, 2011, through on or about 11th day of August, 2016, when the defendant was 17 years of age or older, commit two or more acts of sexual abuse against Alicia Gonzalez, a pseudonym, a child younger than 14 years of age, namely, aggravated sexual assault of a child, by intentionally or knowingly causing the sexual organ of Alicia Gonzalez to contact the sexual organ of the defendant, aggravated sexual assault of a child by intentionally or knowingly causing the penetration of the sexual organ of Alicia Gonzalez by defendant's sexual organ, indecency with a child by, with intent to arouse or gratify the sexual desire of the defendant, engaging in sexual contact with Alicia Gonzalez, by touching any part of the genitals of Alicia Gonzalez[.]

Count II of the indictment (Prohibit Sexual Conduct) alleged that Appellant:

> on or about the 11th day of August, 2016, . . . did then and there intentionally or knowingly engage in sexual intercourse with Alicia Gonzalez, a pseudonym, a person the defendant knew to be, without regard to legitimacy, the defendant's stepchild[.]

In Count I, alleging continuous sexual abuse, it was alleged that Appellant sexually abused the victim over the course of a period of five years, from August 11, 2011, until August 11, 2016. Among the acts of sexual abuse specified in that Count was "aggravated assault of a child by intentionally or knowingly causing the penetration of the sexual organ of [the victim] by [Appellant's] sexual organ[.]"[1] Count 2 alleged that Appellant committed prohibited sexual conduct when, "on or about August 11, 2016," he "intentionally or knowingly engage[d] in sexual intercourse with [the same victim], a person [Appellant] knew to be, without regard to legitimacy, [his] stepchild[.]"[2]

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[1] Sections 21.02(b) and (c) of the Penal Code read, in relevant part:
(b) A person commits an offense if:

(1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and

(2) at the time of the commission of each of the acts of sexual abuse, the actor is 1 7 years of age or older and the victim is a child younger than 14 years of age, regardless of whether the actor knows the age of the victim at the time of the offense.

(c) For purposes of this section, "act of sexual abuse" means any act that is a violation of one or more of the following penal laws:

* * *

(4) aggravated sexual assault under Section 22.021[.]

[2] Section 25.02(a) of the Texas Penal Code reads, in relevant part:
(a) A person commits an offense if the person engages in sexual intercourse or deviant sexual intercourse with another person the actor knows to be, without regard to legitimacy:

* * *

Appellant argued that to convict him and punish him for both, even in a single criminal proceeding, violated his double jeopardy right not to be punished twice for the same offense.

The latter conviction was for an act he committed against the same victim (his stepdaughter) as in the continuous sexual abuse of a child offense. It was also committed within the same timeframe during which he committed the acts comprising the continuous sexual abuse. The jury imposed his punishment in the penitentiary at forty years and five years, respectively, and the trial court ordered his sentences to be served consecutively.[3] Supp. C29, 34; 12R33–34.

Sections 21.02(b) and (c) of the Penal Code read, in relevant part:

> (b) A person commits an offense if:
>
> (1) during a period that is 30 or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and
>
> (2) at the time of the commission of each of the acts of sexual abuse, the actor is 17 years of age or older and the victim is a child younger than 14 years of age, regardless of whether the actor knows the age of the victim at the time of the offense.
>
> (c) For purposes of this section, "act of sexual abuse" means any act that is a violation of one or more of the following penal laws:

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(2) the actor's current ... stepchild[.]

[3] The trial court had discretion to stack the sentences for these two offenses under Section 3 .03(b )(2)(A) of the Texas Penal Code, since the victim was younger than seventeen years of age. See TEX. PENAL CODE§ 3.03(b)(2)(A).

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* * *

(4) aggravated sexual assault under Section 22.021[.]

On appeal, Appellant argued that punishment for both offenses violated the Double Jeopardy Clause of the Fifth Amendment, 5th Amend., U.S. Const. The Thirteenth Court of Appeals agreed and vacated Appellant's conviction for prohibited sexual conduct. *Ramos v. State*, No. 13-17-00429-CR, 2020 WL 4219574, at *7–11 (Tex. App.—Corpus Christi July 23, 2020) (mem. op., not designated for publication). This Court reversed the judgment of the Court of Appeals and remand the cause to that court to address an outstanding point of error related to Appellant's conviction for the prohibited sexual conduct offense.

The Double Jeopardy Clause of the Fifth Amendment, which the United States Supreme Court has held to be applicable to the states through the Fourteenth Amendment, is understood to incorporate three protections: (1) protection against a second prosecution for the "same" offense following an acquittal; (2) protection against a second prosecution for the "same" offense following a conviction, and (3) protection against multiple punishments for the "same" offense. *Kuykendall v. State*, 611 S.W.3d 625, 627 (Tex. Crim. App. 2020); Speights v. State, 464 S.W.3d 719, 722 (Tex. Crim. App. 2015). The present case involves an argument related to the third of these protections.

It is undisputed that these multiple punishments claim arise in the context of punishing the same criminal act twice under two distinct statutes when the legislature intended the conduct to be punished only once . . . ." *Langs v. State*, 183 S.W.3d 680, 685 (Tex. Crim. App. 2006).

*Blockburger v. United States*, 284 U.S. 299, 304 (1932) provides the starting point for determining "sameness" for multiple-punishments double-jeopardy analysis. Under Blockburger, two separately defined statutory offenses are presumed not to be the same so long as each requires proof of an elemental fact that the other does not. *Littrell v. State*, 271 S.W.3d 273, 276 (Tex. Crim. App. 2008); *Shelby v. State*, 448 S.W.3d 431,436 (Tex. Crim. App. 2014). In comparing elements of the different statutory provisions, this Court has said, that it examines the statutory elements in the abstract as well as the offenses as pleaded. *Shelby v. State*, 448 S.W.3d 431, 436 (Tex. Crim. App. 2014); *see also Bigon v. State*, 252 S.W.3d 360, 370 (Tex. Crim. App. 2008).[4] Ultimately, "[t]he inquiry is whether the Legislature intended to permit multiple punishments." *Ervin v. State*, 991 S.W.2d 804, 814 (Tex. Crim. App. 1999). The *Erwin* factors to be considered are:

> [W]hether the offenses provisions are contained within the same statutory section, whether the offenses are phrased in the alternative, whether the

[4] The victim testified to one main incident that occurred specifically on August 11, 2016, in which Appellant penetrated her vagina with his penis. That date corresponds both with the last day of the five-year period alleged in Count I (alleging continuous sexual abuse of a child), and with the date of the offense alleged in Count II ( alleging prohibited sexual conduct). The victim also testified more generally that Appellant had committed other acts of sexual abuse upon her during the five-year period, and Appellant was convicted of both offenses.

> offenses are named similarly, whether the offenses have common punishment ranges, whether the offenses have a common focus (i.e. whether the "gravamen" of the offense is the same) and whether that common focus tends to indicate a single instance of conduct, whether the elements that differ between the offenses can be considered the "same" under an imputed theory of liability which would result in the offenses being considered the same under Blockburger (i.e. a liberalized Blockburger standard utilizing imputed elements), and whether there is legislative history containing an articulation of an intent to treat the offenses as the same or different for double jeopardy purposes.

Where, as here, two distinct statutory provisions are involved, "the offenses must be considered the same under both an 'elements' analysis and a 'units' analysis for a double-jeopardy violation to occur." *Ex parte Benson*, 459 S.W.3d 67, 71 (Tex. Crim. App. 2015) (holding that in the multiple-punishment context, the double-jeopardy clause prevents a court from prescribing greater punishment than the legislature intended). Where two distinct statutory provisions are involved, "the offenses must be considered the same under both an 'elements' analysis and a 'units' analysis for a double-jeopardy violation to occur." *Id.*

**Units Analysis:** Where two separate statutory provisions are the same under the elements analysis, "the protection against double jeopardy is not violated if the offenses constitute separate allowable units of prosecution." *Ex parte Benson*, 459 S.W.3d at 73. The units analysis asks: "(1) what the allowable unit of prosecution is, and (2) how many units have been shown. The first part of the analysis is purely a question of statutory construction and generally requires ascertaining the focus or gravamen of the offense. The second part requires an examination of the trial record,

which can include the evidence presented at trial." *Ex parte Benson*, 459 S.W.3d at 73–74 (citations omitted).

*The Gravamen*: The gravamen it is merely a way of ascertaining the unit of prosecution of an offense, which is the ultimate consideration under such analysis. *Loving v. State*, 401 S.W.3d 642, 647 (Tex. Crim. App. 2013) ("Absent an express statement defining the allowable unit of prosecution, the gravamen of an offense best describes the allowable unit of prosecution."). This Court has given more weight to the fifth and sixth [*Ervin*] factors, which requires examination of the focus or gravamen of each offense and compare the resulting allowable units of prosecution. Although determining the allowable unit of prosecution is part of a separate "units" analysis (conducted when only a single statute is involved or after offenses proscribed by two statutes are deemed the same under an "elements" analysis), consideration of the unit of prosecution plays a role even in an "elements" analysis by helping to ascertain the legislative intent. *Ex parte Benson*, 459 S.W.3d at 73.

The unit of prosecution of a given predicate offense is each completed act. See, e.g., Vick v. State, 991 S.W.2d 830, 833 (Tex. Crim. App. 1999) (holding that multiple prosecutions for aggravated sexual assault based on different statutory subsections are permissible because the Legislature defined the "allowable unit of prosecution" as each completed act).

As pleaded, the State refers to the following as one of the completed acts that would satisfy the CSA statute: "aggravated sexual assault of a child by intentionally or knowingly causing the penetration of the sexual organ of Alicia Gonzalez, by Defendant's sexual organ." The reason the appellate court focused on the act of penetration is because it is important in this context. Under the PSC statute, penetration ("sexual intercourse" under the statute) is a separate and distinct unit of prosecution from the alternative charge of "deviate sexual intercourse." *See Badillo v. State*, 255 S.W.3d 125, 128–29 (Tex. App. 2008) (noting that the State can indict a defendant for both PSC-deviate sexual intercourse and PSC-sexual intercourse, but it must choose to submit only one alternative means to the jury).

The State created this dilemma by omitting as a predicate offense candidate in Count 1 ("aggravated sexual assault of a child by intentionally or knowingly causing the penetration of the sexual organ of Alicia Gonzalez, by Defendant's sexual organ") then there is no question that Defendant could be convicted of both prohibited sexual abuse and prohibited sexual conduct. The appellate court's focus was properly focused on the unit of prosecution for the instant PSC count as penetration. The State chose to plead otherwise.

A units analysis is whether prohibited sexual conduct, as pleaded, qualifies as one of those acts of sexual abuse that is part of a series of acts of sexual abuse that occur over an extended period of time against a single complainant. However this

question is superfluous when comparing continuous sexual abuse with an enumerated predicate offense because the unit of prosecution of a predicate offense is merely one of those very acts that constitute the series of acts of sexual abuse that form the unit of prosecution for continuous sexual abuse, with the completed conduct of the predicate offense standing in a whole-part relation to the series of completed acts of conduct that is the unit of prosecution of the continuous sexual abuse offense. However, in this context, this merely gives way to the elements analysis. If double punishments are permissible here under the elements analysis, then PSC is simply outside of the series of acts of sexual abuse which form the unit of prosecution of CSA, and thus the units analysis permits double punishments as well. If on the other hand, double punishments are prohibited under the elements analysis, then PSC properly serves as one of the series of acts of sexual abuse which form the unit of prosecution of CSA (standing in a part-whole relation), and the units analysis prohibits double punishments as well.

*Presumption*: If the two offenses have different elements under the Blockburger test, the judicial presumption is that the offenses are different for double-jeopardy purposes and that cumulative punishment may be imposed. This presumption can be rebutted by a showing, through various factors, that the legislature 'clearly intended only one' punishment." *Ex parte Benson*, 459 S.W.3d at 72. The "clear evidence to the contrary" needed to rebut the presumption really is

just a consideration of the *Ervin* factors. This is how courts routinely deal with the judicial presumption that arises where two statutes fail the Blockburger sameness test. Ex parte Benson, 459 S.W.3d 67, 72 (Tex. Crim. App. 2015) ("*In Ex parte Ervin*, we set forth a non-exclusive list of factors to consider in determining whether the legislature intended only one punishment for offenses that contain different elements under Blockburger . . . ."). There is no other "clear evidence to the contrary" over and beyond the Ervin factors needed to rebut any so-called "strong presumption."

*The Continuous Sexual Abuse's Comprehensive Treatment of Predicate Offenses is not Dispositive*

Whether or not a given offense is listed an enumerated predicate offense is not conclusive to the Double Jeopardy analysis. The State in *Price v. State* similarly argued "that because an attempt to commit a predicate offense is not included in the acts of sexual abuse enumerated in the statute, the Legislature intended to permit dual convictions for continuous sexual abuse and for an attempt to commit a predicate offense under the statute." *Price v. State*, 434 S.W.3d 601, 605 (Tex. Crim. App. 2014) (extensively discussing the legislative history behind the CSA statute in its analysis). The *Price* Court, however, disagreed with the State. *Price*, 434 S.W.3d at 611 (holding that "the Legislature did not intend to permit dual convictions under these circumstances and that appellant's criminal-attempt conviction was, therefore,

statutorily prohibited."). Thus, whether or not a given offense is listed an enumerated predicate offense is not conclusive to the Double Jeopardy analysis. At most, we are left with the same ambiguity that the Price Court acknowledged before proceeding to analyze the consideration of extra-textual factors. *Price,* 434 S.W.3d at 605 ("After reviewing the statutory language, we decide that it is ambiguous as to whether it permits dual convictions for the offenses of continuous sexual abuse and attempted aggravated sexual assault. We then consider the extra-textual factors before ultimately deciding that permitting dual convictions under these circumstances would violate the statutory scheme set forth by the Legislature.").

*The State's Argument Regarding the Gravamens of CSA and PSC is Wrongheaded: The Legislature Was Aware that Prohibiting Dual Convictions by Virtue of the CSA Statute Would Sweep in Crimes Involving Sex Between Family Members*

As the State suggests, merely looking at the inclusion of aggravated sexual assault as an enumerated offense shows that the legislature was aware that the new continuous sexual abuse statute would inevitably sweep in conduct where there is sex between family members. Prosecutions and convictions for aggravated sexual assault where there is a child victim who is related to the defendant were common before the Legislature passed the continuous sexual abuse statute.

For example, in *Diaz v. State*, decided years before the Legislature passed the continuous sexual abuse statute, the defendant was indicted and convicted of aggravated sexual assault of a child, and the victim was his daughter. *Diaz v. State*, 125 S.W.3d 739, 741 (Tex. App.—Houston [1st Dist.] 2003, pet. ref'd); *see Palmer v. State*, No. 2-02-040-CR, 2003 WL 1948697 (Tex. App. Apr. 24, 2003) (defendant convicted of aggravated sexual assault of a child where the victim was his daughter). Courts "presume the legislature was aware of all caselaw affecting or relating to the statute." Brown v. State, 915 S.W.2d 533, 536 (Tex. App. 1995), aff'd, 943 S.W.2d 35 (Tex. Crim. App. 1997). Thus, this Court must presume that the legislature was aware that merely by including aggravated sexual assault as a predicate offense, the continuous sexual abuse statute would in fact prevent double punishments for continuous sexual abuse and aggravated sexual assault where there is sex between family members (with aggravated sexual assault requiring a child victim under the age of 14). Furthermore, at a more abstract level, the legislature is presumed to be aware that successful Double Jeopardy claims would reach such facts despite any particular familial relationship not being an element of a predicate offense, by virtue of application of the cognate-pleadings approach used by Texas courts. *See Bigon v. State*, 252 S.W.3d 360, 370 (Tex. Crim. App. 2008) (Under the cognate-pleadings approach adopted by this Court, double-jeopardy challenges should be made even to offenses that have differing elements under Blockburger, if the same 'facts required'

are alleged in the indictment."). These conclusions cut against the State's argument that this Court needs to permit double punishments to vindicate the gravamen of the prohibited sexual conduct statute: sex between family members.

Especially instructive here is *Price* itself, which set out the legislative history of the continuous sexual abuse statute. The *Price* Court, quoting Judge Cochran's concurrence in *Dixon v. State*, 201 S.W.3d 731, 737 (Tex. Crim. App. 2006), noted that prior to the enactment of the continuous sexual abuse statute, the common occurrence in child sex cases was as follows:

> [A] young child is repeatedly molested by an authority figure—usually a step-parent, grandparent, uncle7 or caregiver; there is (or is not) medical evidence of sexual contact; and the child is too young to be able to differentiate one instance of sexual exposure, contact, or penetration from another or have an understanding of arithmetic sufficient to accurately indicate the number of offenses. As in this case, "he did it 100 times." The real gravamen of this criminal behavior is the existence of a sexually abusive relationship with a young child ... marked by continuous and numerous acts of sexual abuse of the same or different varieties.

*Price*, 434 S.W.3d at 607–08 (emphasis added).

Clearly, the legislature never intended to exclude acts of sexual abuse of a child where there is sex between family members from the sweep of the continuous sexual abuse statute. At most, the State has proved only the following: the legislature did not include PSC as an enumerated predicate offense. This would be conclusive if *Blockburger* were the only test pertinent to the Double Jeopardy analysis. However, it is not. *See, e.g., Bigon*, 252 S.W.3d at 370 ("The two offenses are not

the same under a strict application of the Blockburger test, but the Blockburger test is a rule of statutory construction and is not the exclusive test for determining if two offenses are the same.").

Respectfully submitted,

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By: */s/ Victoria Guerra*
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**CERTIFICATE OF SERVICE**

On this 6th day of January 2021, the foregoing motion for extension of time to file Appellant's brief on the merits was to State Prosecuting Attorney John R. Messigner to his email address: information@spa.texas.gov and to Hidalgo Assistant Criminal District Attorney Luis Gonzalez to his email address: appeals@da.co.hidalgo.tx.us via the ECF filing system.

*/s/ Victoria Guerra*
Victoria Guerra

## CERTIFICATE OF COMPLIANCE

In compliance with TRAP 9.4(i)(3), the undersigned certifies that the number of words in this motion, excluding those matters listed in Rule 9.4(i)(l), is 3,448.

SIGNED this 3rd day of December 2021.

*/s/ Victoria Guerra*
Victoria Guerra

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